

**Balboa Ambulance, Inc. and Robert J. Meyers.** Case  
21–CA–29024

February 28, 1994

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND TRUESDALE

The question presented here is whether the judge correctly found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Robert J. Meyers.<sup>1</sup> The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Balboa Ambulance, Inc., San Diego, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> On September 24, 1993, Administrative Law Judge Richard J. Boyce issued the attached decision. The Respondent filed exceptions and a supporting brief.

<sup>2</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent unlawfully discharged Meyers, we do not rely on the judge's implied view that an employee's preparation of a false prehospital patient record would not be significant misconduct unless the employee actually filed the report.

*Robert R. Petering, Esq.*, for the General Counsel.  
*Raul E. Del Rio*, Vice President, of San Diego, California,  
for the Respondent.

**DECISION**

**I. STATEMENT OF THE CASE**

RICHARD J. BOYCE, Administrative Law Judge. I heard this matter in San Diego, California, on June 3, 1993.

The complaint arising from a charge filed by Robert J. Meyers, in his individual capacity, alleges that Balboa Ambulance, Inc. (Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) on October 30, 1992, by discharging Meyers.<sup>1</sup>

<sup>1</sup> The charge was filed on November 2, 1992. The complaint issued on December 31 and was amended during the trial.

**II. JURISDICTION/LABOR ORGANIZATION**

Respondent, a California corporation, provides ambulance services in and around San Diego. The complaint alleges, the answer admits, and I find that it is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admitted during the trial, and I find that the International Association of EMTs and Paramedics (IAEP), AFL–CIO (the Union) is a labor organization within Section 2(5) of the Act.

**III. THE ALLEGEDLY UNLAWFUL DISCHARGE**

*A. Evidence*

Meyers worked for Respondent as an emergency medical technician (EMT) from April 27, 1992, until discharged on October 30, 1992. Earlier on October 30, and the day before, he had been the Union's observer in a two-session NLRB election among Respondent's employees.<sup>2</sup> The count, immediately after the second session, disclosed 16 votes for and 14 against the Union, with 3 challenged ballots.<sup>3</sup> Meyers lodged all three challenges.

Michael Rupert, a union official, had prevailed on Meyers to be an observer only a few minutes before the October 29 session, which began at 4 p.m. Some of the employees had suggested Meyers, reasoning that he planned to leave Respondent shortly after the election, so had little to lose should his serving antagonize Respondent.<sup>4</sup> So far as the record shows, Respondent had no basis, before then, to know Meyers' union sympathies.

Michael Markert, Respondent's operations manager, testified that he recommended Meyers' discharge to others in management in the early afternoon of October 29, before Meyers' designation as an observer, because of misconduct the day before; and that, while the others promptly endorsed his recommendation, Respondent delayed implementation on the advice of counsel until after the election.

Meyers' supposed misconduct consisted of making certain entries on a form, entitled "Prehospital Patient Record," in connection with the abortive transport of a patient from a facility known as Casa Palmera to another known as Scripps Encinitas. Meyers entered, for example, that the patient's pupils were "reactive" and her lungs "clear," the implication being that he had seen and conducted a "preassessment" of the patient.

Meyers' partner that day, Vincent Secor, testified, however, that he and Meyers learned upon arriving at Casa Palmera that the call had been canceled, and that they left "without making any patient contact." Meyers testified, on the other hand, that Secor went to the men's room on their arrival; that a nurse, Jeanette Vermeren, meanwhile aimed him toward the patient's room while on the telephone at the

<sup>2</sup> Case 21–RC–19094.

<sup>3</sup> The Regional Director later determined, after resolving the challenges, that the Union did not receive a majority, and issued a certification of result so indicating.

<sup>4</sup> Meyers testified that he had discussed his intentions with Michael Markert, operations supervisor; that Markert asked him to wait until the October 30 "end of the shift bid" and to give 2 weeks' notice; and that he planned to tender a resignation notice, "already printed with the date on it," on October 30.

nurses station; that he conducted a preassessment of the patient in her room;<sup>5</sup> and that Secor rejoined him following his return to the nurses' station, after which Vermeren reported the cancellation. Secor denied that he used the men's room, and insisted that he and Meyers were never "physically separated."

Entries in Respondent's traffic report for October 28 indicate that Meyers and Secor were at the Casa Palmera 6 minutes, arriving at 10:06 a.m. and leaving at 10:12 a.m.

Vermeren testified that she "pointed" Meyers toward the patient's room and that she saw him "walking towards" the room. She did not see Meyers actually preassess the patient, she testified, and could not recall if Secor accompanied Meyers.<sup>6</sup>

Meyers also wrote on the form:

Sheeted pt. [patient] bed to gurney, monitored v/s [vital signs] en route, all safety precautions taken, TX [transfer] P.O.C [position of comfort].

Meyers testified that he wrote this after returning to the nurses' station (while Vermeren was "still on the telephone" and before learning of the cancellation), having decided upon methodology after seeing the patient. He further testified, in essence, that he did this anticipating standard transport procedures in the circumstances.

Meyers tore up the form after receiving word of the cancellation, placing the remnants in a trash can in the ambulance. He explained:

I was under the assumption that we were there to pick up a patient . . . until I was told this was not the case. That being so, a new piece of paperwork regarding a canceled call would have to be filled out. . . . This paperwork was null and void.

Meyers continued:

[I]t's very hard to go back through three pages . . . and try and erase it all.<sup>7</sup> It makes a mess. . . . So, instead of making a mess of this stuff—I like to hand in nice, clean paperwork. So, what I did was, tore it up, put it in the trash, to just start over.

<sup>5</sup> Meyers particularized concerning his preassessment in this instance:

I . . . walked in the patient's room, said, "Hi, my name's Robert. I'm an EMT. I'm here to take you to Scripps Encinitas for an EEG CAT scan." I placed my hand on her forehead. . . . I asked her, is she okay? She said, "I'm feeling fine." She talked to me. . . . I put my hand over her eye, pulled my hand away. Other eye, pulled my hand away. . . . I asked her if she can move for me. She moved her hands, she wiggled her feet."

<sup>6</sup> Vermeren's account diverged from Meyers' in one curious detail. Whereas he recalled that she told him and Secor of the cancellation at the nurses' station, she testified that, after directing Meyers toward the room, she "vaguely remembered that this was canceled." She went on:

[I]t was indeed canceled. I went down to the room, and I was glad to see that the patient hadn't been taken from the bed to the stretcher yet. Because that would have been a big ordeal for her, she was so ill. . . . And I said, "Whoa, wait, there's no transfer today."

<sup>7</sup> The form was in triplicate.

Meyers added that he intended to do the fresh paperwork "prior to end of shift," and that he had handled past cancellations this way "with no problems from the company whatsoever."<sup>8</sup>

Meyers' and Secor's ambulance developed brake trouble later in the day, foreshortening their shift. The dispatcher instructed them to take Meyers to his car in Oceanside, after which Secor was to return the ambulance to San Diego. Meyers testified that he asked Secor, when they "parted" in Oceanside, if he would do the "paperwork" for the canceled call, and Secor "agreed to do that." Disputing Meyers, Secor testified that Meyers said nothing "about doing any paperwork."

Secor testified that, back in San Diego, he "was putting all the paperwork in order, which is customary at the end of every shift," when he "noticed that there was no paperwork for the Casa Palmera trip." Secor continued:

I remembered Mr. Meyers doing a set of paperwork . . . . I returned to the unit [ambulance] to see if he filed it somewhere else. . . . I did find it in the trash can, ripped up. I then returned to the building to finish a set of paperwork for him. . . . And, basically, I just took the information that you would use on a call like that and the pertinent information, which isn't exactly what was on his original report that was ripped up. I put what we did and what we saw, and then turned that in.

Secor went on that, after filing his Casa Palmera report, he "turned the scraps" retrieved from the trash can "over to Mr. Markert." Secor first testified that Markert "pieced it together [and] looked at it," but said nothing; and that he "went home for the day." Later, asked what he and Markert said at the time, Secor recounted:

Very little. . . . I basically told him the story. I said, "We went on the call. And this was a canceled call." He said, "So?" And I pointed out to him the things that Mr. Meyers had put in that were all inappropriate for not making patient contact. And then he said, "Okay." And that was about the conclusion of our conversation.

Secor testified that he gave the scraps to Markert because "it's jeopardizing patient care." He elaborated:

<sup>8</sup> Markert, responding to a leading question from Respondent's representative, testified that Respondent never made it policy "to rip up the paperwork of a canceled call and substitute . . . a new set of paperwork." Still being led, Markert followed up that the county "strictly" regulates the issuance of these forms and imposes "strict accountability." He went on:

[I]t's more of an economical issue than anything else. These forms cost money. They [the county] keep track of how many forms they issue to a specific agency, as opposed to how many return. . . . And they have been very adamant about not reissuing more forms if you have over a certain amount unaccounted for.

He added, again led, that destroying a form and "recreating a new one" is "inconsistent" with county policy—"it's inconsistent, it's part of what creates the problem, and there shouldn't be any need to do that."

[I]t just seemed so absurd for an EMT . . . to do a patient assessment like this when he made no patient contact like that with them. And to fill in stuff like . . . she was a white female when we never saw the patient. I brought that to the attention of . . . Mr. Markert, and it went from there. . . . I even told Mr. Markert . . . that I had no problem with Robert; I had no problem with him as a partner, or any grief with him, or anything like that. And I didn't set out to get him in trouble or anything. . . . I was very appalled, and his [Meyers'] credibility with me, basically, was shot after that.

Secor had been on Respondent's payroll about a week, most of which had been devoted to training.

Markert testified concerning Secor's coming to him:

I asked him why I was receiving this paperwork. And he pointed out a few areas on the paperwork that he was concerned with. . . . That seemed odd to him, that this information could have been reflected on paperwork when at no time was any contact made with the patient. . . . There are also certain references made to actions taken, movements made with the patient, and in the unit, that there's absolutely no way they could have been made or initiated.

Markert continued that he presently sent Secor "home for the day," then:

With the paperwork in front of me, I looked at it much more closely before I left for the night . . . . I found many discrepancies. I formulated certain questions I needed to follow up with Mr. Secor regarding this particular document. Those being the question of sex, race, pupils, lungs, the COMA scale; again, all the patient-specific assessment information that we were concerned with, as well as the nearest hospital facility and transport facility filled out. And the run codes, to scene, which could have been filled out, and from scene, which could not have been filled out. As well as the wrong unit number and the—again, the patient's specific information in the chief complaint findings where we write our narrative. As well as the ensuing patient movement and transport. As well, at the bottom, under "Responsible Party" at the bottom right, that is the financially responsible party for that patient.

Markert added:

From what's written here, and the way we are trained, I would have to assume that the transport had taken place, and then the attendant had not backed up and completed filling in the gaps that's left here. Because it says, and I quote, "Monitored vital signs en route. All safety precautions taken. Transport position of comfort." Which is the position that you put the patient in for their best comfort during transport.

The following morning, October 29, Markert testified, he called Secor at home. Markert's rendition:

I asked him to write up everything that happened. I also asked him if at any time had Mr. Meyers made patient

contact. I was told no. I asked him if at any time . . . Mr. Meyers had left his sight when they entered the facility. And he said no. I asked him if they reported to the nurses' station, turned around and left the facility. He said yes. At that point I terminated the discussion with Mr. Secor, again affirming, "I need to get a written statement signed by you, and dated, on all the events from the initiation of the call from dispatch to the termination of the call."<sup>9</sup>

Secor likewise testified that Markert called him "the morning after . . . and asked [him] what had happened." Secor evinced uncertainty, however, whether Markert then asked him for a statement, testifying: "I believe, at that time, he asked me to write the whole incident up." Secor further testified that Markert asked if he "had in fact gone to the restroom" at Casa Palmera, which is odd since Markert had yet to hear Meyers' side of the story.

Markert testified that he also called Gwen Jones of the San Diego County Emergency Medical Services (EMS) the morning of October 29. He elaborated:

[W]e discussed the events that had taken place, bringing no names into our discussion. . . . I gave her the specific information I felt was in question on General Counsel 3 [the torn-up form], and that the statements were made and attested to that no patient contact had been made. . . . I first asked her if she had ever had anything like this happen before. And she said no. I asked her if, in her opinion, that was a terminatable offense . . . . She said, "Absolutely, if what you're telling me you have on paper, in front of you, I feel that it is." And she requested from me a written report on the entire incident, so that she could decide whether the county needed to make it an issue with themselves.<sup>10</sup>

Jones did not testify.

At about 12:30 p.m. on October 29, Markert testified, he presented his "findings and recommendation" to John Olson, Respondent's owner and president, Raul Del Rio, its vice president, and Linda Smietana, its nursing director.<sup>11</sup> He still had not spoken with Meyers.

Markert summarized his presentation as follows:

I discussed the facts that had been given to me, the obvious problems of the paperwork that had been submitted by Mr. Secor. That . . . I had further followed up in the morning with Mr. Secor. And I discussed the pertinent questions that I had asked him. Being that I had the physical evidence that I did, as well as my conference with Gwen Jones, only to affirm what I was already thinking about the severity of the situation, my conclusion was [that] this paperwork was initiated prior

<sup>9</sup>The record includes a statement signed by Secor and dated October 30. It says in part: "At no time did Robert or myself make patient contact. Robert was with me at all times and it was not possible at any time for him to have made patient contact and do an assessment."

<sup>10</sup>Markert testified that he sent a written report to Jones. It is not part of the record.

<sup>11</sup>Markert's affidavit states that he saw Olson, Del Rio, and Smietana "at about 10:45 a.m."

to transport; patient contact had not been made. I also used the . . . the traffic logs, that shows them with an on-scene-to-clear time of six minutes. Which is not time to enter the building, speak with a nurse, make a patient contact and assessment, turn around, leave the building, and clear yourself. I know that from my own experience, and with the experience with this facility.

Taking all those things into consideration, my determination was that this was done prior, and without patient contact. And, had the call gone through, this was intended to be submitted as the paperwork for that patient. And there's absolutely no way I can allow somebody to risk the life of a patient without doing a pre-assessment on that patient. And my determination was that termination should be done. And that was concluded just a little bit after 1:00 p.m. on [October] 29th.

Markert continued that, because the first half of the NLRB election was scheduled for later that afternoon, the group, still assembled, called an attorney, Michael Seyle, "to ask his opinion." Markert went on:

And it was his recommendation to us that we not disturb the voting body, of which Mr. Meyers was a part. That conversation was handled over a speaker-phone with all of us in the room. . . . At that point, we decided to wait until the election was done, so that Mr. Meyers' vote would count. . . . And that we would not . . . affect the outcome of the election.

Of those identified by Markert as privy to the Seyle consultation, Olson alone offered putative corroboration. And he, led by Respondent's representative, said only:

To the best of my recollection, he [Seyle] advised that we stay any decision on termination for a couple of days, until the election was over with. . . . [T]he determination was made to support Markert's decision to fire Meyers, but only after the election.

After the polls closed, at 8 a.m. October 30, and before counting the ballots, the presiding Board agent asked the parties if they could resolve the challenges. The Union's Rupert recounted that Meyers said the three in question were supervisors, prompting Olson to exclaim, "Bullshit!"<sup>12</sup>

Meyers testified that Olson shook hands with various people, but not him, following the ballot count. Meyers' account:

He came to me and I held out my hand. . . . He withdrew his hand . . . and looked me in the face and said, basically, . . . "Fuck off." And then . . . Mr. Olson started waving his arms and screaming and yelling, and saying, "Get that son-of-a-bitch out of here. Get that fucker off my property. I want that son-of-a-bitch the hell off my property now." . . . And [he] was red in the face. And very violent. And throwing his arms.

<sup>12</sup> This testimony is uncontroverted, although Meyers testified: "I don't remember any discussion about challenged ballots."

With that, Meyers testified, Olson briefly left the room; then told him on returning that Markert and Smietana wanted to see him.<sup>13</sup>

Rupert corroborated Meyers regarding the above. He testified that Olson "stuck his hand out" when Meyers extended his hand, then "pulled it back and said, 'Fuck you.'" Rupert added that Olson told Meyers to "get off the property"; and, later, that Markert "needs to talk to you."

Olson did not significantly contradict Meyers and Rupert. Admittedly "angry and frustrated at the whole situation," he recalled the encounter this way:

All I stated to Mr. Meyers was . . . "Michael Markert has a message for you." And the previous expletive that I used. And that was it.<sup>14</sup>

Olson did not expressly deny saying he wanted Meyers off the property.

Meyers presently met Markert and Smietana in the office area. Markert testified that he asked Smietana "to take notes, and that's what she did."<sup>15</sup>

Meyers recalled:

They had a folder in their hand. . . . And they said, "We need to see you." . . . [T]hey told me, "We have reason to believe that you filled out paperwork on a patient . . . prior to making a patient contact." . . . Then they pulled out a piece of paper, an EMS form . . . that we fill out on the emergency calls that we run . . . . And the form that they showed me was ripped in six pieces. And I recognized the form. . . . [I]t was taped back together with Scotch tape. . . . [T]hey told me that I was going to be suspended prior to investigation. . . . And then they asked me, "What do you have to say on your behalf in this matter?" And I told them . . . .

Meyers then described the underlying incident in elaborate detail, as he recalled. He testified that Markert and Smietana at length interjected that Secor disputed his account about patient contact; that he "encouraged them to call" Vermeren at Casa Palmera to verify that he made patient contact; and that they rejoined, "Well, we'll investigate it."

Markert testified:

I told him that I would look into what he was saying, and if we found out anything different than what I had already known, then there was a possibility we could consider this a suspension at that point. . . . But as of

<sup>13</sup> Meyers testified, according to the transcript, that Olson "came back and pointed his finger at me and said, 'Markert and Smietana, I want to see you now.'" I think it evident from the surrounding context either that Meyers misspoke or the transcript is in error; that Meyers meant to say, "Markert and Smietana want to see you now."

<sup>14</sup> I take Olson's reference to "the previous expletive" to be an adoption of Meyers' and Rupert's prior testimony that he said "fuck off" or "fuck you." Olson further testified, concerning his anger and frustration: "I expressed it through being mad at just about everybody, even the people that didn't vote. . . . I became a lot more angrier than what I expressed to [Meyers] to other people there."

<sup>15</sup> Smietana's jottings, skimpy in the extreme, are in evidence.

that day it was left as a termination. Anything else is misreading my words.

Sometime during this sequence, according to Meyers, Olson “stood up” from a nearby desk, and

started waving his arms, and came at me in a very violent manner, and said, “Get him the hell off my property. . . . Get him the fuck out of here. I don’t ever want to see you around Balboa again. I want you out of here. Don’t ever come back.” And [he] chased me out of the office, and . . . out the front door. . . . And then I went with Mr. Markert to the parking lot.

Markert, while less graphic, effectively corroborated Meyers regarding this incident. He testified that Olson told them “to leave rather abruptly,” and that he “sensed a lot of anger and frustration there.”<sup>16</sup> Markert’s affidavit states, moreover: “John Olson interrupted us and said that he wanted him [Meyers] away from those offices, take this outside now.”

Meyers testified that he and Markert had this exchange in the parking lot:

I asked Mr. Markert, I said, “Why are you guys going this? You knew . . . that I was going to plan on giving you two weeks’ notice.” . . . He said, “You know this is out of my control. This is John Olson that’s doing this, and I have no control over what he does.”

Markert did not dispute this account. Nor did Smietana, who, according to Markert, “was by my side through all contact with Mr. Meyers.”

Markert testified that he undertook further investigation on October 30 after telling Meyers he was fired. He particularized:

What we did at that point was bring Mr. Secor in, and discussed it with him. What had taken place, start to finish. Had he used the restroom? Because that question came up from Mr. Meyers that morning, said he went to the bathroom, he was having a problem with his bladder, with frequent urination, from drinking coffee. I asked him all of those questions. He . . . denied it. And again, with all the evidence at that point, I saw absolutely no reason that I should believe otherwise.

Markert testified that he spoke with Secor “at first availability,” but that he “couldn’t say if it was late or early” in the day; that Del Rio also “was there,” but that he did not know if Smietana “was still on the grounds or not”; and that all this took “probably 30 minutes.” Secor said nothing about this in his recital; and Del Rio, Respondent’s representative in the trial, did not testify.

Markert would have it that, after again interviewing Secor, he

<sup>16</sup>Markert added that “the general climate . . . in the vicinity of Mr. Olson seemed slightly frustrated, angry” after the ballot count; that Olson told dispatcher Traycee Martinez “rather loudly and with anger to get everybody . . . the hell out of the dispatch area”; that Olson’s “anger and frustration . . . was being directed in all directions”; and that “it seemed generally best to stay out of [Olson’s] way.”

went back over everything that I had. I wanted to know, not for anyone else, not for here or any court in the land, I wanted to know for myself that what I had done was right. I went back and looked over everything I had. And it just screamed at me, the same thing. . . . I looked over GC3 [the torn-up form], as well as—there are a few more that have not been entered in here, such as the company-patient invoice, the dispatch ticket . . . that we take the information on, as well as Mr. Secor’s first statement . . . , nurse Smietana’s notes from the discussions with Mr. Meyers, and the traffic logs . . . for the times. And none of it equated with what Mr. Meyers had told me.

Markert then injected, as if assuming that Secor’s restroom visit would have prevented Meyers’ proceeding with the task at hand: “And to add a bathroom trip to the six minutes here . . . really puts it over the top.”

Markert testified that he “probably spent . . . a good hour” reevaluating all the evidence on October 30, beyond which he has “looked at it on numerous occasions since then, and there’s absolutely nothing that has changed [his] mind since then.”

On concluding his reevaluation, Markert testified, he told Olson that he “had no recommendations to alter,” and Olson replied, “Leave it at the termination level.” Olson said nothing about this in his testimony.

Meyers returned to Respondent’s office on November 2 seeking a copy of his personnel file. Markert then gave him a document bearing the date of October 29 and stating:

Robert is being terminated for falsifying a legal document, in particular a county EMS form. We have sufficient evidence to prove a pre-assessment was done on paper prior to patient contact being made.

Meyers testified that he questioned the document’s date, and that Markert “did not comment.” Markert’s testimony did not cover this, but his affidavit states:

The date on this form is 10–29–92 which reflects the date I signed it and made the decision to terminate Meyers. It should have read effective 10–30–92.

Meyers also testified:

I told Michael at that time, I said, “If you would let me resign and let me finish my two weeks, we could make all this go away. And we wouldn’t have this problem.” And he said again, he reiterated, that it was out of his hands and this was Mr. Olson.

Markert did not controvert Meyers in this respect.

Meyers testified that his preassessment of the patient in question “probably took . . . about 30 seconds.” Markert testified that a preassessment, “done properly,” entails “at least 45 seconds of work.” Markert appended, perhaps forgetting his stated premise that Meyers had not made patient contact:

And from the statements I have seen, from a conversation on the telephone with Mr. Secor and Mr. Meyers, these were not done properly.

Asked why he did not invite Meyers' account before reaching his fateful decision, Markert testified variously:

(a) That Meyers "was not there," he "had gone home for the evening."

(b) That Secor, a "brand-new employee" had "no reason whatsoever, and nothing to gain, by telling me anything that was false."

(c) That Secor "came up with very specific answers to all my questions . . . that evening and the following morning."

(d) That Meyers' "word was spoken for him" circumstantially, revealing that he "did not have ample time" to make patient contact.

(e) That Markert "had the physical evidence of GC3 in front of [him], and that, along with the times on Respondent's [traffic reports], spoke for the whole ball of wax."

(f) That Meyers "had been evasive with certain things [Markert] had questioned before," and that Markert consequently felt he "was going to get the same type of reaction" this time.<sup>17</sup>

Markert ignored Meyers' suggestion that he ask Casa Palmera's Vermeren if Meyers made patient contact. He explained:

It is not policy to involve other agencies, unless we have a problem with that agency. It's not my policy to make public wrongdoings by my employees. In that sense, I did not contact the nurse.

Markert testified that Meyers "was satisfactory . . . as far as EMT skills go." He added that that "was only one facet of his performance," however, and that Meyers' partners often complained about his disregard of "company rules and regulations." Markert averred that he could "think of three separate people who came to [him] on numerous occasions with their problems," and that this persisted throughout Meyers' tenure.

The complaints, Markert specified, concerned Meyers' once asking a partner to stop by his house while responding to a call;<sup>18</sup> his once wanting to finish his meal before responding to a call, even though his partner "was adamant . . . to go to this call"; his proposing to a partner that they misrepresent their location so the dispatcher would send another ambulance to answer a call; and his driving too fast. Asked his response to these complaints, Markert testified:

I would say . . . probably only three of the instances . . . were severe enough . . . that I actually needed to counsel him. Counsel's even a strong word. Mention to him . . . I got denials every time.

Markert admittedly took no action against Meyers for asking the partner to detour by his house while answering a call. He explained:

<sup>17</sup> Asked about Meyers' prior evasiveness, Markert cited an instance in which Meyers supposedly asked his partner (not Secor), who was driving, to stop by Meyers' house while answering a call. Markert elaborated:

I discussed it with both individuals, and I got the same reaction that I expected . . . from Mr. Meyers, being: "It's his word against mine"; "I don't know what he's talking about"; "It never happened."

<sup>18</sup> Mentioned in the preceding footnote.

I felt it inappropriate to act upon word against word. . . . I planned on keeping Mr. Meyers on, anyway, . . . [so] I felt no need to alienate him by taking someone else's word over his.

Markert gave this rationale for withholding formal discipline otherwise:

I feel that if I am going to follow through with the discipline, especially of the nature of termination or suspension, something that's going to cost the individual, . . . I want to know . . . that I was doing the right thing. I want to know I had cause. And without evidence other than myself or management personnel seeing him speed, for instance, or if I have word against word, . . . it's very hard for me to follow through on that point. Because there is no evidence for me to go with other than testimony.

Olson stated in a to-whom-it-may-concern letter dated August 14, 1992:

Robert J. Meyers has worked for my organization since April 27, 1992. During this time, Robert J. Meyers has functioned as an Emergency Medical Technician/Ambulance Driver.

Robert J. Meyers is an outstanding individual who is capable, motivated and has a genuine interest and dedication to his job.

Robert J. Meyers relates well with others and also deals well with authority. By my observations of Robert's attitude and performance, he has tremendous potential and would be an asset to any organization that would wish to employ him.

### B. Discussion

In *Wright Line*, 251 NLRB 1083, 1089 (1980), the Board stated:

[W]e shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.<sup>19</sup>

I conclude, based on the following aggregate of factors, that the General Counsel has made the requisite prima facie showing:

(a) Respondent discharged Meyers moments after conclusion of the NLRB election.

(b) Olson, Respondent's president and owner, admittedly was "angry and frustrated" in the election's aftermath, and directed inordinate wrath toward Meyers—refusing to shake his hand, saying either "fuck you" or "fuck off" to him,

<sup>19</sup> This formulation received Supreme Court approval in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

exclaiming that he wanted “that son-of-a-bitch [Meyers] out of here,” etc.<sup>20</sup>

(c) Given that the preliminary ballot count favored the Union, one reasonably can infer that Olson’s displeasure with Meyers derived from Meyers’ having contributed to that result, as the Union’s observer, by challenging the eligibility of those whose ballots ultimately defeated the Union.

(d) Respondent’s efforts to place Olson at the periphery of the discharge decision were defeated by Meyers’ convincing and uncontradicted testimony that Markert said in substance, on both October 30 and November 2, that the discharge was Olson’s doing.

(e) As shown by Olson’s to-whom-it-may-concern letter, he had regarded Meyers as a decided asset to Respondent.

I conclude, as well, that Respondent has not overcome the General Counsel’s prima facie showing. My reasons:

(a) I fail to see that Meyers engaged in any patient-endangering or otherwise significant misconduct, and find Respondent’s contrary contention to be baldly disingenuous. Meyers did not submit false data, after all, and Respondent would never have known about the supposedly incriminating form had it not pieced together shards exhumed from the trash.

(b) By any objective measure, some of the other conduct attributed to Meyers—seeking to misrepresent the location of his ambulance, for instance—was more serious than that said to trigger the discharge, yet was overlooked.<sup>21</sup>

(c) I am unpersuaded by Respondent’s contention that the discharge decision was made on October 29, before Meyers’ designation as an observer. First, Markert’s testimony—that others in management endorsed his recommendation earlier that day, and they decided to delay implementation after conferring with an attorney—not only was unconvincing standing alone,<sup>22</sup> but glaringly devoid of meaningful corroboration. Second, Markert did not give Meyers a termination notice until November 2, even though the document is dated October 29 and Markert’s affidavit says he signed it that day, all of which indicates that it was of belated manufacture.

(d) The record contains manifold indicia that Markert’s purported investigation was a hoax:

(i) Whereas Meyers did not tell Markert until the discharge conversation on October 30 that Secor had used the restroom at Casa Palmera, Secor testified that Markert asked him the morning of October 29 if he “had in fact gone to restroom.” This indicates, both to the contrary, that Markert did not discuss the matter with Secor before the discharge—and definitely not on October 29 before Markert professedly reached his decision.<sup>23</sup>

(ii) While Markert would have it that he and Del Rio interviewed Secor again on October 30, as part of a

postdischarge reconsideration, neither Secor nor Del Rio supplied corroboration.

(iii) Markert testified that he presented his “findings and recommendation” to others in management at 12:30 p.m. on October 29, not at 10:45 a.m. as stated in his affidavit. This suggests a belated recognition that the earlier time would not accommodate the investigation that Markert claims to have undertaken the morning of October 29.

(iv) Although Markert maintained that he interviewed and reinterviewed Secor, and painstakingly reviewed the pertinent documents several times over, all to ensure that “what [he] had done was right,” he effected the discharge without bothering to speak with Meyers or with Casa Palmera’s Vermeren.<sup>24</sup>

(v) Olson did not corroborate Markert that he told Olson, after supposedly reevaluating the evidence, that he “had no recommendations to alter,” and Olson responded, “Leave it at the termination level.”

(e) In light of Markert’s evident lack of veracity in so many other critical respects, I reject as counterfeit his stated belief that Meyers did not make patient contact at Casa Palmera.<sup>25</sup>

To summarize, the General Counsel made a prima facie showing that Respondent violated Section 8(a)(3) and (1) by discharging Meyers, and Respondent failed to overcome that showing.

#### CONCLUSION OF LAW

Respondent violated Section 8(a)(3) and (1) on October 30, 1992, by discharging Robert J. Meyers.

#### REMEDY

I will provide in my recommended Order that Respondent cease and desist from the unfair labor practice I have found, and that it take certain affirmative action to effectuate the policies of the Act.

With regard to the latter, I will direct that Respondent offer Meyers reinstatement to his former or a substantially equivalent position, without prejudice to his seniority and other rights or privileges; that it make him whole with interest where appropriate for his loss of earnings and benefits because of its unlawful discharge of him;<sup>26</sup> and that it remove from its files and destroy any and all writings comprising, documenting, or referring to said discharge, and notify Meyers that this has been done and that that unlawful action will in no way serve as a ground for or influence future personnel or disciplinary action against him.

<sup>20</sup> I credit Meyers that Olson carried on in this manner. His testimony not only was uncontroverted, but was corroborated in significant detail by Olson and the Union’s Rupert.

<sup>21</sup> Markert’s assertion that he “felt it inappropriate to act upon word against word,” if true, only underscores the incriminating anomaly of Respondent’s so readily expelling Meyers in its post-election truculence.

<sup>22</sup> I did not find Markert to be a compelling presence on the witness stand, either in demeanor or testimonial content.

<sup>23</sup> The October 30 date on the statement Markert solicited from Secor, while not necessarily belying their testimony that Markert questioned Secor on October 29, certainly does not reinforce it.

<sup>24</sup> The assorted reasons advanced by Markert for not eliciting Meyers’ story were singularly unconvincing.

<sup>25</sup> Recognizing that Respondent’s actions toward Meyers must be assessed in the context of its perception of his conduct, rather than the actuality, I nevertheless credit Meyers that he in fact made patient contact at Casa Palmera. His testimony in that regard was convincingly detailed and generally more persuasive than that of Secor, who came across as a committed pawn of management.

<sup>26</sup> Meyers’ make-whole entitlement shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest shall be figured as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>27</sup>

### ORDER

The Respondent, Balboa Ambulance, Inc., San Diego, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for belonging to or engaging in activities in support of the International Association of EMTs and Paramedics (IAEP), AFL-CIO or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take this affirmative action necessary to effectuate the policies of the Act.

(a) Offer Robert J. Meyers immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights or privileges; and make him whole as prescribed above in the remedy section for any loss of earnings and benefits he suffered because of Respondent's unlawful discharge of him.

(b) Remove from its files and destroy any and all writings comprising, documenting, or referring to said discharge, and notify Meyers in writing that this has been done and that that unlawful action will in no way serve as a ground for or influence future personnel or disciplinary action against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business in San Diego, California, copies of the attached notice marked "Appendix."<sup>28</sup> Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent imme-

diately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize  
To form, join, or assist any union  
To bargain collectively through representatives of their own choice  
To act together for other mutual aid or protection  
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against employees for belonging to or engaging in activities in support of the International Association of EMTs and Paramedics (IAEP), AFL-CIO or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Robert J. Meyers immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights or privileges; and WE WILL make him whole for any loss of earnings and benefits he suffered because of our unlawful discharge of him.

WE WILL remove from our files and destroy any and all writings comprising, documenting, or referring to said discharge, and notify Meyers in writing that this has been done and that that unlawful action will in no way serve as a ground for or influence future personnel or disciplinary action against him.

BALBOA AMBULANCE, INC.

<sup>27</sup> I deny any outstanding motions inconsistent with this Order. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>28</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."